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Subject:	Further Question on ARARs Clarification
Date:	03/09/2010 04:40 PM

Lori and Kurt,

I've been tasked with following up with you on two items relating to State ARARs in Lori's February 10 letter.

The first of these is a question with respect to the designation of DEQ's 2007 *Guidance for Assessing Bioaccumulative Chemicals of Concern in Sediment* as a TBC. In the LWG request for clarification on February 1, we asked for clarification as to what specifically EPA believed should be considered that was not already considered. In response, you explained that:

> "EPA discussed with DEQ the LWG's requested clarification. By its terms, the DEQ guidance may inform cleanup levels in addition to risk assessment. For example, we envision DEQ's guidance could be used for any possible chemicals not considered in the Portland Harbor food web model."

We are not sure we understand what this means and, because this guidance document applies to screening and risk assessment, and we have already submitted to EPA our draft risk assessments, we think it is important to make sure we understand exactly what you mean.

DEQ's 2007 *Guidance for Assessing Bioaccumulative Chemicals of Concern in Sediment*:

> "describes a process used by the Oregon Department of Environmental Quality (DEQ) to evaluate chemicals found in sediment for their potential contribution to risk as a result of bioaccumulation. It is presented here as an example of a method that others may use for that purpose, if appropriate. Its use, however, is not required." (Guidance, page 1)

Our risk assessors feel that they have used an equivalent process and that these steps have therefore already been fully considered. Specifically, although the guidance focuses mostly on screening steps based on sediment screening level values (SLVs), it also explains what to do after the comparison to SLVs:

> "If the BCOI concentration is still greater than its site-specific SLV, do one of the following:
>
> "a. Evaluate the feasibility of cleaning up areas exceeding SLV levels to the site-specific SLV or to ND, whichever is higher, or, for a naturally occurring chemical, to its background

concentration ***

"or

"b. Collect data on the concentration of BCOIs in fish or benthic invertebrate tissue using one of the following methods, and then continue with Step 5.

"i. Collect existing tissue data from an area that is applicable to your site (e.g., has appropriate fish home range and analytes) or data from fish caught or benthic invertebrates collected at your site for this purpose; or

"ii. Perform laboratory or in situ bioaccumulation tests on sediment from the site.

"5. Compare the estimated or measured concentration of each BCOI in fish or benthic invertebrate tissue to appropriate acceptable tissue levels (ATLw and ATLh) or critical tissue levels (CTL). If the concentration is lower, no further action is required with respect to bioaccumulation for that COI and you should continue with a regular toxicity evaluation. If the BCOI concentration is greater than the ATL or CTL, the COI must be considered a chemical of potential concern (COPC) with respect to bioaccumulation and must be cleaned up to a bioaccumulation-based level or to ND, whichever is higher; or, for a naturally occurring compound, to its background concentration."

The guidance document applies to screening and risk assessment steps, which have already been completed and submitted in draft to EPA. The LWG doesn't see any issue here, because its Human Health and Ecological risk assessors believe they have performed the equivalent of the steps quoted above in the HHRA and the BERA and in the development of the sediment PRGs and that this approach has therefore already been fully considered. Does EPA have a different view?

Our second issue regarding State ARARs is really a comment relating to the Oregon Environmental Cleanup Law, under which EPA identified both the acceptable risk levels and hot spot rules as ARARs. With respect to both of these, the LWG agreed they were ARARs but expressed its understanding that any particular criteria or requirement associated with these rules would be applied in the context of the Oregon Cleanup Law and implementing rules as a whole. By that we meant that you need to compare apples to apples--when applying these Oregon requirements as ARARs, you need to apply them to the output of a risk assessment as it would be done under Oregon law. In the LWG request for clarification, we provided specific examples of why those criteria could not be applied directly to the output of the EPA-directed risk assessment because the EPA risk assessment was done differently, and likely more conservatively, than it would have been done under Oregon law—essentially apples and oranges.

The response you provided was that "DEQ considers the risk assessment performed by the LWG to be generally consistent with what DEQ would require under its program, and adequate for determining whether acceptable risk levels are exceeded at the site." We don't disagree that the EPA risk assessment is adequate under Oregon law. However, we do believe it is likely more conservative, which causes the apples and oranges problem if you try to apply the acceptable risk criteria or the hot spot rules directly to the output of the EPA-directed risk assessment.

We do not think this is an insurmountable problem. Our technical teams are having discussions on risk and hot spots and trying to work with the output of the EPA directed risk assessment. We think it is most productive for these conversations to continue on the technical level. However, when we get to the point in the future of trying to determine what it means to apply Oregon acceptable risk rules or Oregon hot spot rules as ARARs, we believe that discussion will need to come back to an apples-to-apples comparison. We are hoping that the technical discussions will help us understand how to best make those comparisons.

Thanks for your input on these issues.

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